mean? There is no difficulty about the Malay word "Hebah" which means gift without consideration. PW3 and PW4 agreed on this. They also agreed that the value of the land mentioned in the "Deed of Sale" and the amount received were always inserted for the purpose of stamp duty in respect of transfers by way of sale as well as by way of gift. The real problem is to ascertain the meaning of the words "Penukar Hebah.'

PW3, the Land Officer, produced exhibit P-2B which contains the original Deed of Sale. In it there are only two "Register Penukar" namely Nos. 60/31 and 69/31 although PW3 said there was only one in it, namely No. 60/31, the document in question. The rest are all just numbers without the words "Register Penukar". In the form below the heading "Deed of Sale" are written words "Surat $\frac{\text{Perjualan}}{\text{Hebah}}$ Tanah" (Memorandum of Sale of Land or Memorandum of Gift of Land).

PW4, who retired as Director of Lands, Kedah, after 35 years' service, stated that this was the first time he saw the words "Penukar Hebah" on a document. He had never seen it before. In his opinion these words mean a gift with a condition to retransfer it to the donor when requested by him to do so. As PW4 had stated that this was the first time he had seen these words on a document it became necessary for the Court to make a research into the old records, if any, at the Land Office to discover if there were other evidence to support the interpretation given by PW4 or if they conveyed other meaning. The relevant law applicable to the document in question (Register Penukar No. 60/1331) and also Register Penukar No. 69/1331 referred to above is the Registration of Documents Enactment 1310 as the said documents were dated 21.5.1331 and 3.6.1331 respectively. The rest of the documents in Exhibit P-2B which did not bear the words "Register Penukar" were governed by the Registration of Sales and Mortgages (Land) Enactment 1331. Unfortunately the 1310 Enactment, which was repealed by the Registration of Sales and Mortgages (Land) 1331 Enactment on 11.7.31, is untraceable. But the Register of Documents under the said 1310 Enactment is fortunately still available. In it there are a number of documents with the words "Penukar Hebah" and "Penukar Perjualan" at the top right hand corner similar to the words "Penukar Hebah" in the title deed Exhibit "A". On careful perusal of these documents it would appear that the word "Penukar" means nothing more than transfer and therefore "Register Penukar" is Register of transfer and "Penukar Perjualan" or "Penukar Hebah" is just transfer by way of sale or by way of gift. In the Register Penukar 69/31 itself it was stated "Jual Putus" meaning an absolute sale and in Register Penukar 60/31 "Hebah Putus" meaning an outright gift. Therefore, with respect to PW4, to my mind "Register Penukar 60/31" could not be a conditional gift. If it had been the intention of the donors that the gift be subject to certain conditions such conditions would have appeared in the old "Deed of Sale". Even if the interpretation given by PW4 were correct, in my view, the proper person to claim the re-transfer would be the donor himself as the meaning assigned to the words "Penukar Hebah" by PW4 was "a gift with a condition to re-transfer it to the donor when requested by him to do so." In this case the claim was made by the legal representatives. In the circumstances, I am of opinion that the transfer was an outright gift and therefore the claim of the plaintiffs should be dismissed with costs.

Claim dismissed.

Solicitors: *Pillai, Lim, Lee & Hwang; Wong Sheng Chan.*

D.E.F. v. THE COMPTROLLER OF INCOME TAX

[C. A. (Rose C.J., Buttrose and Ambrose JJ.) January 17, 1961]

[Singapore — Civil Appeal No. 21 of 1960]

Revenue — Scheme of purchase and re-sale — Single transaction of purchase and sale of land — Whether profit therefrom liable to income tax.

Income Tax Ordinance (Cap. 166), s.10(1)(a) — "Trade" or "Business" — Isolated transaction — Adventure in the nature of trade.

The appellant was the Assistant Manager of a firm trading in commodities and was in no way concerned in and had nothing to do with property or dealings in land whatsoever. Having received information from the wife of a neighbour that a certain rubber estate in Ipoh was for sale, he purchased it on December 22, 1955, without previously inspecting it, for a sum of $240,000 which he borrowed free of interest from his brother. On January 9, 1956, he sold the estate to a company for $485,000, having negotiated the sale through his wife's brother-in-law. His wife and his brother were shareholders in the company, and his wife's brother-in-law, and the neighbour referred to above were two of its directors. Out of the proceeds of sale he repaid the loan and invested the balance. Throughout the transaction the appellant was not the nominee of any person or company.

The appellant was assessed by the Comptroller of Income Tax on the profit of $245,000. On the Comptroller refusing to amend the assessment after objection, the appellant appealed to the Board of Review on the ground that the profit did not arise from the carrying on of a trade or business within the meaning of those terms in section 10(1)(a) of the Income Tax Ordinance. The Board found in favour of the taxpayer and the Board's decision was as follows: "It is admitted that the appellant is not the nominee of any other interested person or company. The Board finds that the rubber estate was purchased and sold in pursuance of a scheme of purchase and resale. The Board does not accept the evidence of the appellant to the contrary. Nevertheless, the Board is of the opinion that the profit made by the appellant is a capital appreciation and not a profit chargeable to tax. The appeal is allowed with costs".

From that decision the Comptroller appealed to the High Court and the decision of the Board of Review was reversed by Chua J. who held that the transaction in question constituted a business within the meaning of section 10(1)(a) of the Ordinance.

Held: (1) the purchase and sale of the estate did not constitute a trade or business and accordingly the profit arising therefrom was not income subject to tax under section 10(1)(a) of the Income Tax Ordinance;

(2) the words "trade, business, profession or vocation," in section 10(1)(a) of the Income Tax Ordinance all involve the continuous exercise of an activity;

(3) the term "business" in section 10(1)(a) does not apply to one isolated act, or business transaction;

(4) whether or not the appellant is carrying on a trade or business is a question of mixed fact and law. If the Board of Review did not err in law, its decision on the issue of fact involved must stand unless it cannot be regarded as a reasonable decision;

(5) *per* Rose C.J. and Buttrose J., (Ambrose J. dissenting), the bare purchase and resale of a rubber estate would not constitute an adventure in the nature of trade under the English Income Tax Act, 1952.

Appeal allowed and the judgment of the High Court reported in [1960] M.L.J. 267 reversed.

Cases referred to:—

(1) *H. Co., Ltd.* v. *The Commissioner of Income Tax*, 1 East African Tax Cases 65.
(2) *Martin* v. *Lowrie*, 11 T.C. 297.
(3) *Pickford* v. *Quirke*, 13 T.C. 251.
(4) *Leeming* v. *Jones*, 15 T.C. 333.
(5) *Edwards* v. *Bairstow*, 36 T.C. 207.
(6) *Commissioners of Inland Revenue* v. *Fraser*, 24 T.C. 498.
(7) *Rutledge's case*, 14 T.C. 490.
(8) *Hesketh Estates Ltd.* v. *Craddock*, 25 T.C. 1.
(9) *Coglan* v. *Federal Commissioner of Taxation* (1930) 47 C.L.R. 109.
(10) *Commissioner of Inland Revenue* v. *Stott*, [1928] A.D. 252.
(11) *Blockey* v. *Federal Commissioner of Taxation* (1923) 31 C.L.R. 503.
(12) *Californian Copper Syndicate case*, 5 T.C. 159.
(13) *The Ormond Investment Co. Ltd.* v. *Betts*, 13 T.C. 400.
(14) *Coltness Iron Company* v. *Black*, 1 T.C. 287.
(15) *Jackson's Trustees* v. *Lord Advocate*, 10 T.C. 460.
(16) *Commissioners for Inland Revenue* v. *Leydenberg Platinum Ltd.* [1929] A.D. 137.
(17) *Cape Brandy Syndicate case*, 12 T.C. 358.
(18) *South Behar Railway Co. case*, 12 T.C. 711.
(19) *Smith* v. *Anderson*, 15 Ch. D. 277.

COURT OF APPEAL, Income Tax Appeal.

G. S. Hill (*Dennis Lee* with him) for the appellant.

Lim Chor Pee (Crown Counsel) for the respondent.

Cur. Adv. Vult.

Rose C.J.: I have had the advantage of reading the judgments of my brothers and agree with their conclusion that the appeal should be allowed, with the consequences stated by them.

I would add that, leaving aside the question as to whether the decision in the Kenya case of *H. Co., Ltd.* v. *The Commissioner of Income Tax*,[1] can be considered to have been rightly decided on the facts, I agree with the opinion of both my brothers that Windham J.'s interpretation of the word "business" would seem to be too wide.

On the hypothetical point as to whether the transaction in question could properly be held to be "an adventure in the nature of trade", within the meaning of the (English) Income Tax Act 1952, it would seem to be very much a borderline case. My brothers are not in accord as to which side of the line the present matter falls. Were it necessary to decide the point, I myself incline to the opinion that the transaction in question would not be held in the English Courts to be an adventure in the nature of trade.

The other matters raised in the appeal have been exhaustively and lucidly dealt with by my brothers, and there is nothing that I can usefully add.

Buttrose J.: This is an appeal under section 81 of the Income Tax Ordinance (Chapter 166), hereinafter referred to as "the Ordinance", from a judgment of Chua J., which decided that an isolated transaction of purchase and resale of a rubber estate by the appellant taxpayer constituted a business of the taxpayer and that he was liable to pay income tax in respect of the profit he made on the resale on the basis that it was "profits from a business" within the meaning of section 10(1)(a) of the Ordinance.

The taxpayer purchased the rubber estate which was situated in Ipoh without inspecting it for $240,000 which he borrowed from his brother for that purpose and within three weeks resold it for $485,000 making a profit of $245,000. Out of this profit the taxpayer repaid the loan he had received from his brother and kept the balance which he invested. It was not in dispute that this was an isolated transaction or dealing in land by the taxpayer, that he was not the nominee of any person or company and that he was in no way concerned in and had nothing to do with property or dealings in land whatsoever.

Pursuant to the provisions of section 73 of the Ordinance the Comptroller made an additional assessment upon the taxpayer in the sum of $69,121.48 on an income of $245,000 being the profit derived by the taxpayer for the sale of the rubber estate.

The taxpayer objected to the assessment and on the Comptroller refusing to amend it the taxpayer appealed to the Board of Review against the assessment on the ground that the sale of the Rubber Estate did not constitute the carrying out of a trade within the meaning of section 10(1)(a) of the Ordinance. The Board found in favour of the taxpayer and their decision is as follows:—

> "It is admitted that the appellant is not the nominee for any other interested person or company. The Board finds that the Rubber Estate was purchased and sold in pursuance of a scheme of purchase and resale. The Board does not accept the evidence of the appellant to the contrary. Nevertheless the Board is of the opinion that the profit made by the appellant is a capital appreciation and not a profit chargeable to tax. The appeal is allowed with costs."

From that decision the Comptroller appealed to the High Court on the ground that the Board was wrong in law in holding that the profit made by the taxpayer was capital appreciation and therefore not chargeable to tax under the provisions of section 10(1)(a) of the Ordinance. Chua J. found in favour of the Comptroller and

the taxpayer now appeals from his decision on the ground that the learned Judge erred in law in holding that the purchase and resale of the Rubber Estate by the taxpayer, which was an isolated transaction, constituted the carrying on of a business by him within the meaning of section 10(1)(a) of the Ordinance.

This section provides that income tax shall . . . . be payable . . . . upon the income of any person . . . . in respect of gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised.

It was not disputed on the hearing of this appeal that the taxpayer was not trading and the substantial question for determination was as to whether this isolated transaction constituted a business within the meaning of the section.

As, however, considerable argument was addressed to us on the question as to whether the transaction was an adventure or concern in the nature of trade under the English Income Tax Act 1952, I propose to express my views briefly on the subject.

There is no definition of "trade" or "business" in the Ordinance but the English Income Tax Act, 1952, defines trade as including every trade, manufacture, adventure or concern in the nature of trade. The learned Judge took the view that while this isolated transaction of the taxpayer would not be a trade as distinct from an adventure in the nature of trade under the English Act it would nevertheless be an adventure in the nature of trade. I agree that it is quite clear that this lone transaction did not constitute a trade and the principles to be applied were clearly enunciated in *Martin* v. *Lowrie*,[2] and *Pickford* v. *Quirke*,[3] and it is unnecessary for me to restate them. But during the course of the argument I inclined to the view taken by Chua J. that it would be an adventure in the nature of trade under the English Act. As, however, I have now arrived at a different conclusion, I propose to embark on a brief examination of the authorities.

In *Leeming* v. *Jones*,[4] a syndicate of four persons acquired two rubber estates with a view to resale at a profit and the estates were eventually sold to a company at a profit. It was held to be an isolated capital transaction. Though the acquisition was made with the sole object of turning it over again at a profit and at no time was it the Syndicate's intention to hold on to the investment, it was none the less a capital transaction and not a concern in the nature of trade. Lord Buckmaster said at page 357 "an accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realisation does not make it income". And Viscount Dunedin at page 360 said "The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of trade in respect of his investments but, *per se*, it leads to no conclusion whatever". The crucial question is not whether the purchase was made with the intention of resale but whether the adventure was in the nature of trade and every case must be decided on its own facts.

It was to overcome this decision that section 26(a) was inserted in the Income Tax and Social Services Contribution Assessment Act 1936-1957 of Australia. This section has been described as a statutory declaration of what has always been accepted as settled law in Australia, namely, that a profit derived from any transaction or scheme entered into for the purpose of profit-making is assessable income notwithstanding that the transaction or scheme does not amount to or is not part of a trade or business. There is no such provision in the Ordinance and it must be borne in mind that in Australia it is income from all sources which is taxable while in Singapore it is income from all specified sources. It is to be noted that in *Gunn's Commonwealth Income Tax Law and Practice* 6th Ed. 328 it is suggested that since the House of Lords' decision in *Edwards* v. *Bairstow*,[5] there is more likelihood that an English Court would now find that an isolated transaction entered upon for profit making is an adventure in the nature of trade.

The facts in *Edwards* v. *Bairstow* were as follows:—

Bairstow and Harrison who were respectively a director of a leather manufacturing company and an employee of a spinning firm purchased a complete cotton spinning plant in 1946 with the object of selling it as quickly as possible at a profit. They hoped to sell the plant in one lot but ultimately had to dispose of it in five separate lots over the period from November 1946 to February 1948. The General Commissioners in the first instance found that it was an isolated case and not taxable and on the case being remitted to them by the Chancery Division decided that the transaction was not an adventure in the nature of trade. The House of Lords held that the only reasonable conclusion on the evidence was that the transaction was an adventure in the nature of trade and they considered the four conditions approved by the Court in *Leeming* v. *Jones*, one of which must be present to establish the existence of an adventure in the nature of trade. These conditions are:—

(a) The existence of an organisation, or

(b) activities which lead to the maturing of the asset to be sold, or

(c) the existence of special skill, opportunities in connection with the article dealt with, or

(d) the fact that the nature of the asset itself should lend itself to commercial transactions.

The House of Lords found that there was an organisation in existence in *Bairstow's case* in the association of the two respondents and their subsequent operations. There were activities such as renovations and replacements which led to the maturing of the asset and there was search for opportunities for its sale. The machinery was in fact sold in five separate lots. One of the respondents was an employee of a spinning firm from which it was not unreasonable to infer the

existence of some skill and opportunities in connection with a cotton spinning plant. Finally, it was held that the nature of the asset lent itself to commercial transactions.

None of these tests or conditions have been fulfilled in the present case which was simply a bare purchase and resale of a rubber estate. On that basis I do not think an English Court would have found that this transaction with which we are now concerned was an adventure in the nature of trade because there was nothing else apart from the purchase and sale which stamped it with the indicia of trade.

In the Scottish whisky case of *Commissioners of Inland Revenue* v. *Fraser*,[6] the taxpayer, a woodcutter, bought a large quantity of whisky in bond and some two years later resold it at a profit. He had no special knowledge of the trade and this was his sole dealing in whisky. It is to be observed, however, that the whisky was purchased in three lots; one lot was purchased in December 1937, another in May 1938 and the third in November of the same year. The taxpayer's object in purchasing the whisky was to resell it at a profit. It was held that the transaction was an adventure in the nature of trade. Lord Normand at page 502 drew a distinction between a purchase of land and a purchase of whisky. "A man", he said, "may purchase land with a view to realising it at a profit, but it also may yield him an income while he continues to hold it. If he continues to hold it there may also be a certain pride of possession. But the purchaser of a large quantity of a commodity like whisky greatly in excess of what could be used by himself, his family and friends, a commodity which yields no pride of possession, which cannot be turned to account except by a process of realisation I can scarcely consider to be other than an adventure in a transaction in the nature of trade". The nature of the asset in the circumstances of the case lent itself to commercial transactions as did the cotton spinning plant in *Edwards* v. *Bairstow, supra* and the toilet paper in *Rutledge's case*[7].

After a careful examination of the authorities, I have been unable to find a single instance of an isolated transaction of sale and purchase and nothing more being held to be an adventure or concern in the nature of trade.

In all the cases where it has been so held, there have been additional or attendant circumstances as illustrated in the authorities to which I have briefly referred which render the transaction an adventure or concern in the nature of trade. This isolated transaction of the taxpayer without more is not, in my opinion, an adventure in the nature of trade under the English Act.

Was it a business within the meaning of section 10(1)(a) of the Ordinance?

Mr. Hill in the course of his lucid and informative argument drew our attention to the relevant legislation in other Commonwealth countries including India, South Africa and Australia and to the cases cited in connection therewith.

There is no definition of "business" in the Ordinance but the word undoubtedly has a wider context than the word "trade". In *Hesketh Estates Ltd.* v. *Craddock*,[8] at page 7, Wrottesly J. pointed out that most people who are engaged in trade are commonly said to be engaged in business but the contrary position is not true. There are businesses that cannot be said to be trades. Starke J., in the Australian case of *Coglan* v. *Federal Commissioner of Taxation*,[9] at page 111, said: — "The word 'business' — or 'trade' — is as has been said an elastic word, capable of wide extension: but the cases suggest that the term implies or connotes a series or a repetition of acts in carrying on or carrying out a scheme for profit-making". In the South African case of *Commissioner of Inland Revenue* v. *Stott*,[10] it was laid down that in determining the question whether a person is carrying on business in relation to the Union Income Tax Act, which like the Ordinance does not contain a definition of "business", regard must be had to the factors of the acquisition of gain and the continuity of acts.

In the Australian case of *Blockey* v. *Federal Commissioner of Taxation*,[11] at 507, Isaacs J. propounded the test in this way: "Is the gain made an enlargement of capital arising from the mere realisation of property or is it a gain made in business operations in the course of carrying on a scheme for profit making?" The facts in that case disclosed a definite and interconnected scheme for profit-making by buying and selling wheat scrib through brokers. The profit was not the product of a single instance or of two or more unconnected instances but of a series of transactions, connected by a common purpose, that of dealing in wheat scrib. That case again emphasized that carrying on business imports a series or repetition of acts the sum of which constitutes the business.

The respondent relied on the *Californian Copper Syndicate case*[12] in support of his contention, as I understood it, that the operation of a scheme for profit making comes within the term "business" as used in section 10(1)(a) of the Ordinance even if only for a day or however short a period. He put it in another way by saying that a single scheme for profit making is either an adventure in the nature of trade or a business transaction involving a profit. In the *Californian Copper Syndicate case* a company bought property for the purpose of selling it and it was held in that respect they carried on a trade. But the transaction was of a type which the Company was authorised to carry on under its Memorandum of Association. It had other business and this trade was not to be dissevered from that business. The scheme for profit making was part of the general trading purposes of the Company and it was the trading or business profits which were taxable not the transaction itself. The present case is clearly distinguishable.

A scheme for profit-making by itself is not the same as carrying on business and even if it were it is quite clear on the Australian and South African cases to which I have just referred that an isolated purchase and resale without more is not a scheme for profit-making. A scheme implies something much more elaborate.

Now the word "business" in section 10(1)(a) of the Ordinance is used in association with "trade", "profession" or "vocation", all of which connote habitual and systematic operations, a continuity or repetition of acts or similar operations. Taking the Ordinance as a whole there can be no doubt that the business must be carried on and section 10(1)(a) clearly implies it. The term "business" as used in the section does not apply to one isolated act; it does not mean a "business transaction".

That, with respect, is, in my opinion, the error into which the learned Judge in the Kenya case of *H. Co. Ltd.* v. *The Commissioner of Income Tax*,[1] fell. He held that the word "business" in section 7(1)(a) of the Kenya Income Tax Ordinance (Chapter 254), the material portions of which are the same as our section 10(1)(a), included an isolated business transaction or any "piece of business". This case, which was relied on by Chua J., was, in my view, wrongly decided by Windham J. for he failed to appreciate that the business must be carried on. He does not appear to have been referred to or considered any other Commonwealth legislation or authority on the point and his decision runs counter to all the cases in other Commonwealth countries on the subject. "Business" does not mean "business transaction" unless the legislature says so. The word "transaction" is not included after the word "business" in section 10(1)(a) and it could and should have been if that was the intention of the legislature. It cannot be read into the section.

In construing an Income Tax Statute, Lord Buckmaster in *The Ormond Investment Co., Ltd.* v. *Betts*,[13] at pp. 425 and 426, said "I have not overlooked the cardinal principle well known to the common law and that has not been and ought not to be weakened, namely, that the imposition of a tax must be in plain terms. In the words of Lord Blackburn in *Coltness Iron Company* v. *Black*,[14] at page 316, 'no tax can be imposed on a subject without the words in an Act of Parliament clearly showing an intention to lay a burden on him'. It is in that respect kindred to the creation of a penalty or the establishment of a crime. The subject ought not to be involved in these liabilities by an elaborate process of hair-splitting arguments."

Again in *Jackson's Trustees* v. *Lord Advocate*,[15] at page 476, Lord Blackburn said, "I am not prepared to give effect to an argument which requires me to read any word into a taxing Act for the purpose of making the incidence of taxation heavier on an individual."

Even if, however, the Kenya case was rightly decided it is distinguishable on the facts, which were as follows:—

The taxpayer, a holding company with power, under its Memorandum of Association, to acquire sell and dispose of any property and any business and to carry on any business so acquired, purchased an estate with a view to resale. It had previously and subsequently operated as a holding company. The estate was divided into four parts and sold to four different purchasers over a period of approximately 18 months. The taxpayer employed an agent to dispose of the estate but save for some trifling expenditure on maintenance it incurred no expenditure on development nor did it set up any organisation to sell the estate.

In the first place the taxpayer in the Kenya case was a company and not an individual, and the test to be applied in the case of an individual is not quite the same as the test in the case of a trading company. Though as a general rule in the case of an individual one or two isolated transactions cannot be described as the carrying on of a business, in the case of a company the fact that there has only been one profit-making transaction is in no way decisive of the question whether the profit was made in the carrying on of the company's business or otherwise. See *Commissioners for Inland Revenue* v. *Leydenberg Platinum Ltd.*[16] Secondly the taxpayer's Memorandum of Association included a power to deal in land. Thirdly, there had been a previous purchase with the intention of resale. Fourthly, the land was subdivided to make it more readily saleable.

It cannot therefore under any circumstances be held to apply to the facts in the present case, assuming the decision to be correct which, in my opinion, it was not.

In the *Cape Brandy Syndicate case*,[17] a syndicate was formed to acquire a quantity of brandy for subsequent sale. The brandy was bought in three instalments and shipped to the United Kingdom, blended by the firms to which the members of the syndicate belonged with French brandy purchased by the syndicate and re-casked and sold in numerous lots, about 100 transactions of sale in all between July 1916 and September 1917. This was held to be carrying on a business as, in my view, quite obviously it was whereas one transaction only would, equally obviously not have been carrying on a business.

Again as Lord Sumner pointed out in the *South Behar Railway Coy. case*[18] — "The present is not the case of a company existing to do one act only and once for all. Not only did the company make the agreement of 1906 but it plays its recurring part in every payment and receipt of gains and there is here, therefore, that 'repetition of acts' which Lord Justice Brett says in *Smith* v. *Anderson*[19] at page 277 is implied in 'carrying on business' ".

For these reasons therefore this isolated transaction of purchase and sale of a rubber estate by the taxpayer did not constitute a business of the taxpayer and consequently in my judgment he was not liable to pay income tax in

respect of the profit he made on the resale because it was not a "profit from a business" within the meaning of section 10(1)(a) of the Ordinance.

This disposes of the appeal in the taxpayer's favour. I think I should add, however, that, in my opinion, there was no error of law on the part of the Board of Review. On the evidence it was open to the Board to find, and they were entitled to find, that this transaction did not involve the taxpayer in the carrying on of a business.

If there was no error in law then the question of how many deals make a business is one of degree and eminently and exclusively a question of fact for the Board whose functions cannot be disturbed unless the decision was perverse or contrary to the evidence. In the view I take of the case the true and only reasonable conclusion to be drawn from the evidence is that the taxpayer was not carrying on business. On that ground alone, so it seems to me, the decision of the Board cannot be disturbed.

In the result therefore the appeal must be allowed with costs, and the judgment of the Court below reversed. The assessment will be annulled and the tax already paid must be refunded to the taxpayer.

Ambrose J.: This is an appeal by a taxpayer from a judgment of the High Court setting aside a decision of the Board of Review and restoring an assessment made by the Comptroller of Income Tax.

The question raised by the appeal is whether a profit of $245,000 made by the appellant by purchasing and selling a rubber estate was income received by him in respect of a profit from a business.

The facts are as follows. The appellant is the assistant manager of a firm trading in rubber, copra and pepper. In 1955, he received information from the wife of a neighbour that a certain rubber estate in Ipoh was for sale. Without previously inspecting the estate, he bought it on the 22nd December, 1955, for $240,000, with money borrowed, free of interest, from his brother. His wife and his brother were shareholders in a certain limited company: his wife's brother-in-law and the neighbour referred to above were directors of the company. On the 9th January, 1956, he sold the estate to the company for $485.000, having negotiated the sale through his wife's brother-in-law. He repaid the loan and invested the profit. This was an isolated dealing in land by the appellant. He was not the nominee of any person or company.

The Comptroller of Income Tax made an assessment of $69,121.48 in respect of the profit of $245,000 for the year of assessment 1956. The taxpayer appealed to the Board of Review, who allowed his appeal with costs. The Board decided that the rubber estate was purchased and sold in pursuance of a scheme of purchase and resale; but that the profit was a capital appreciation and not a profit chargeable to tax.

The Comptroller appealed to the High Court from the decision of the Board of Review. The High Court allowed the appeal with costs. It was held by the High Court that the isolated transaction was an adventure in the nature of trade; that it was a business of the taxpayer; and that the profit was clearly income and therefore chargeable to tax under section 10(1)(a) of the Income Tax Ordinance.

Section 10(1)(a) reads as follows:

> Income tax shall, subject to the provisions of this Ordinance, be payable . . . . . upon the income of any person accruing in or derived from the Colony or received in the Colony from outside the Colony in respect of —
> (a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised;

The first point submitted by counsel for the appellant was that the transaction was not an adventure in the nature of trade. It was said on the authority of *Leeming* v. *Jones*,[4] *Edwards* v. *Bairstow*,[5] and other English cases that one of the following conditions must be present before a transaction could be held to be an adventure in the nature of trade:

(1) the existence of an organisation.
(2) activities which led to the maturing of the asset to be sold;
(3) the existence of special skill, opportunities, in connection with the article dealt with;
(4) the fact that the nature of the asset itself should lend itself to commercial transactions.

In my opinion, there was in the appellant's case as much organisation as the transaction required; there was the existence of opportunities in connection with the asset dealt with; and the nature of the asset lent itself to commercial transactions. In my judgment, therefore, the transaction was an adventure in the nature of trade.

The second point submitted by counsel for the appellant was that the appellant was not liable to income tax unless the profit was derived from a business carried on by him: and that, in fact, it was not so derived. It may be stated here that the Ordinance does not define a "business". It was argued that "business" involved a repetition of acts, and that an isolated transaction does not constitute a business. It was urged that the words in section 10(1)(a) "for whatever period of time such trade, business, profession or vocation may have been carried on or exercised" imply that the business from which the profit is derived must be a business which has been carried on. It was further urged that section 35 which provides for the ascertainment of statutory income supports this view.

Section 35(3) reads:

> "The statutory income of any person from any trade, business . . . . . for the year of assessment in which he commenced to carry on or exercise such trade, business . . . . . and for the two following years of assessment shall be ascertained in accordance with the following provisions:"

Section 35(5) provides:

> "Where a person permanently ceases to carry on or exercise a trade, business . . . . . his statutory income

therefrom shall be as regards the year of assessment in which the cessation occurs the amount of the income of that year".

The learned Judge in the Court below took the view that the word "business" includes anything which occupies the time, attention and labour of a man for the purpose of profit. He held that the isolated transaction in the present case was wholly insufficient by itself to constitute a trade: that it was an adventure in the nature of trade; and that the word "business" is wide enough to embrace it. Looking at section 10(1)(a) and particularly at the added words "for whatever period of time such trade, business, profession or vocation may have been carried on or exercised", he saw no reason for limiting the word "business" in the way suggested on behalf of the taxpayer. He did not think that the added words required that the business should have been carried on.

The learned Judge relied on the decision and reasoning of Windham J. in construing section 7(1)(a) of the Kenya Income Tax Ordinance in the Kenya case of *H. Co., Ltd.* v. *Commissioner of Income Tax.* (1) That provision of the Kenya Ordinance is identical with section 10(1)(a) of the Singapore Ordinance. According to Windham J., the word "business" is wide enough to include a single business transaction: the purpose of inserting the added words is to extend rather than restrict the scope of the preceding words: the effect of the added words is that a business which has endured for a brief period of time is none the less a business, whether it is a single business transaction or a business in the more usual sense. With due respect to Windham J., it seems to me that the extension of the scope of the word "business" by inserting the added words is intelligible if the word refers to a business in the more usual sense but not if it includes a single business transaction.

In my view, the fundamental idea underlying the three words "trade, ... profession or vocation" in section 10(1)(a) of the Singapore Income Tax Ordinance is the continuous exercise of an activity. Considering the context, it seems to me that the same fundamental idea underlies the word "business" which appears between the word "trade" and the words "profession or vocation"; and that the word "business" must, therefore, be given its ordinary meaning, namely, an occupation habitually engaged in, especially for livelihood or gain. If the word "business" is wide enough in the context under consideration to include anything which occupies the time, attention and labour of a man for the purpose of profit, there would be no need to mention trade, profession or vocation. Reading section 10(1)(a) with section 35(3) and 35(5), I take the view that the business from which the profit is derived has to be a business which has been carried on. The phrase "carried on" implies a repetition or series of acts and confirms the fundamental idea of the continuous exercise of an activity. If my view of the meaning of the word "business" in its context is right, I do not see how it could be construed to include an adventure in the nature of trade, in the absence of any statutory provision corresponding to the definition of business in section 2 of the Indian Income Tax Act, which states that "business" includes "any trade, commerce, or manufacture, or any adventure or concern in the nature of trade, commerce, or manufacture." That seems to me to be no more possible than to construe "trade" as including an adventure in the nature of trade, in the absence of a statutory definition corresponding to the definition of "trade" in the English Income Tax Act, which states that "trade" includes an adventure in the nature of trade. For the above reasons I come to the conclusion that the appellant derived a profit from a business transaction carried out by him but not from a business carried on by him.

I must make it clear, however, that, in my opinion, if it is proved that a person intended to carry on a business and that he carried out one business transaction with that intention, then he has carried on a business. Thus, in the Kenya case which I have referred to, although I disagree with Windham J.'s interpretation of the word "business", I think the decision was right on the facts. In that case, the appellant company was a holding company with power under its memorandum of association to acquire, sell and dispose of any property and any business, and to carry on any business so acquired. It purchased an estate with a view to resale. The estate was divided into four parts and sold to four different purchasers in the course of 18 months. Its intention to carry on the business of buying and selling land was clear from the memorandum. In my opinion, considering the clear intention, the carrying out of the isolated business transaction was clearly the carrying on of a business: and it would have made no difference if the land had been sold to one purchaser without any sub-division.

The third point submitted by counsel for the appellant was this: if the Board of Review has not erred in law, the question whether the appellant was carrying on a business is exclusively a question for the Board, unless the decision of the Board is unreasonable. It seems to me that the learned Judge in the Court below, which was exercising its appellate jurisdiction, took the view that the Board had erred in law in regard to the meaning of the word "business" and had, as a result, reached the wrong conclusion. If the Board so erred in law, he had the power to interfere with the decision of the Board on what was, in my opinion, a question of mixed law and fact,

under section 81(2) of the Income Tax Ordinance. But as, in my judgment, the Board did not err in law in regard to the meaning of the word "business", the decision of the Board as regards the question of fact involved in the question of mixed law and fact must stand, unless it cannot be regarded as a reasonable conclusion. In my opinion, it was not only a reasonable conclusion but the only reasonable conclusion in the absence of any evidence of any intention on the part of the appellant to carry on a business.

In the result, I would allow the appeal with costs here and in the Court below, reverse the judgment of the High Court, annul the assessment made by the Comptroller of Income Tax in respect of the profit of $245,000, and order a refund of the income tax paid by the taxpayer under the assessment.

Appeal allowed.

Solicitors: *Lee & Lee; State Advocate-General.*

LEE CHEE WAN & ORS. v. PUBLIC PROSECUTOR

[C. A. (Thomson, C.J., Ong and Ismail Khan, JJ.) December 21, 1960]

[K. L. — F.M. Criminal Appeal No. 23 of 1960]

Criminal Law and Procedure — Joinder of trial — Capital offences and non-capital offence — Penal Code, ss.302 and 307 — Criminal Procedure Code (Cap. 6), Chapters XX and XXII.

A trial by jury for two capital offences together with a non-capital offence is a nullity.

COURT OF APPEAL.

David Marshall (*Jag-Jit Singh* with him) for 1st, 2nd, 3rd, 4th & 5th appellants.

M. S. Mahendran for the 6th appellant.

Tengku Ahmad Rithauddeen (Deputy Public Prosecutor) for respondent.

Thomson C.J. (delivering oral judgment of the Court): These six appellants were tried together on two charges of murder in contravention of section 302 of the Penal Code and one charge of attempted murder in contravention of section 307 of the Penal Code. They were all convicted on all three charges and, with the exception of one of them who was a young person, were sentenced to death in respect of the first charge.

The three charges were tried together by a Judge and jury.

The offences were committed in the State of Perak and the trial took place in that State. The trial therefore was governed by the provisions of the Criminal Procedure Code of the former Federated Malay States.

Under that Code in any case where the punishment of death is authorised by law the accused person is to be tried by a jury and the proceedings at the trial are to be in accordance with the provisions of Chapter XXII of the Code. In other cases, that is to say where the punishment of death is not authorised by law, the trial is to be had before a Judge alone and the procedure is to be governed by the provisions of Chapter XX of the Criminal Procedure Code (Cap. 6).

The punishment for murder is death. The punishment for attempted murder is imprisonment.

In our opinion a trial by jury for two capital offences together with a non-capital offence is a nullity.

In the circumstances we have no option but to allow the appeal, to quash the convictions and order a re-trial.

Appeal allowed. Re-trial ordered.

PUBLIC PROSECUTOR v. NAI PRASIT

[R. Cr. J. (Thomson, C.J.) January 24, 1961]

[K. L. — Selangor Criminal Revision No. 3 of 1961]

Criminal Law and Procedure — Bigamy — Jurisdiction to try offence committed outside Federation — Courts Ordinance, 1948, s.59 — Penal Code, s.494.

The Sessions Court has no jurisdiction to try the offence of bigamy committed outside the Federation.

Case referred to:—

(1) *The Trial of Earl Russell* [1901] A.C. 446.

CRIMINAL REVISION.

Thomson C.J.: The accused in this case was convicted in the Sessions Court at Kuala Lumpur for bigamy in contravention of section 494 of the Penal Code.

The actual act of bigamy, that is to say, the second marriage which was alleged to be void by reason of the wife of the first marriage being still alive, took place in the State of Victoria in the Commonwealth of Australia. In the circumstances the Sessions Court had no jurisdiction to try the case. The territorial jurisdiction of the Sessions Court is set out in section 59 of the Courts Ordinance and section 9 of the Criminal Procedure Code and except in the case of certain offences committed on the High Seas (that is outside territorial waters) the Court has no jurisdiction to try any offence committed outside the Federation.

In the present case, therefore, the proceedings were a nullity and the conviction of the accused is accordingly set aside.

In order to avoid misunderstanding I should point out that the power of the English Courts to try a bigamy committed outside their territorial jurisdiction (see *Earl Russell's case*[1]) depends entirely on the wording of section 57 of the Offences against the Person Act, 1861, which has nothing in common with the wording of section 494 of the Penal Code.

I would add that in this particular case the Court had no power to take cognisance of the offence wherever it was committed because the complaint which commenced the proceedings was made by a Police Officer and not, as required by section 131 of the Criminal Procedure Code, by any person aggrieved or by the Public Prosecutor.

Conviction set aside.